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CONVENTION ON JURISDICTIONAL IMMUNITIES OF STATES AND THEIR PROPERTY

Report of the Secretary-General

Addendum

CONTENTS

Page

II. REPLIES RECEIVED FROM STATES

China 2

Germany 3

Turkey 6

* A/47/150.

92-40258 3460i (E) 080992 110992

/...

CHINA

[Original: Chinese]

[16 July 1992]

1. The question of jurisdictional immunities of States and their property is a vital question of international theory and practice. After years of continued efforts, the International Law Commission of the United Nations finally adopted, on second reading, the draft articles on jurisdictional immunities of States and their property (hereinafter referred to as "the draft articles") at its forty-third session, in 1991. The Chinese Government pays tribute to the International Law Commission, especially to its two Special Rapporteurs, for the outstanding work they have done in this respect. It supports the convening of an international conference on this subject for the purpose of negotiating and concluding a convention on jurisdictional immunities of States and their property.

2. Before making specific comments on the text of the draft articles, the Chinese Government wishes to point out that the jurisdictional immunities enjoyed by States and their property constitute a long-established principle of international law which is widely recognized among States. It has its fundamental legal basis in the principle of State sovereignty and equality of sovereignty and the principle of par in parem non habet jurisdictionem. We believe, therefore, that the purpose of establishing a legal regime on jurisdictional immunities of States and their property should be to reaffirm and strengthen the international legal principles concerning jurisdictional immunities of States and, on this basis, taking into account the differences between States as to their social, economic and legal systems and proceeding from the actual need of contemporary intercourse of States, to provide for certain exceptions to which the principle of State immunities cannot be applied, in order to strike a necessary balance between the reduction and prevention by a sovereign State of abuses of its internal judicial proceedings and the provision of fair and just means for settling disputes, thus contributing to the development of international economic and commercial exchanges and cooperation and the promotion of friendly relations between States. In the light of the above, we believe that the draft articles, first of all, affirm the jurisdictional immunities of States and their property as a general principle of international law while taking into account the actual need for conducting and strengthening international intercourse. They also provide, on the premise of the consent of States, for certain exceptions to the applicability of this principle, thus safeguarding the established principles of international law in this domain, while reflecting more fully the realities of the development of contemporary international relations. Taken as a whole, then, the draft articles are acceptable.

3. It should be noted in particular that the definition of "State" in article 2 excludes entities established by the State which are capable of exercising civil responsibilities and have the right to occupy and dispose of

its property and engage in business transactions. In addition, article 10, paragraph 3, makes a clear distinction between the legal position of a State and that of a State enterprise with regard to the question of jurisdictional immunities. In the opinion of the Chinese Government, these two articles have great significance. They will help prevent cases of abuse of judicial proceedings by a State against the State of nationality of the enterprise concerned, thus contributing to the normal development of international relations. For this reason, the said provisions of these two articles are of utmost importance to the draft articles.

4. For more effective realization of the purposes of the draft articles, the Chinese Government believes that certain provisions of the draft articles must be further improved; accordingly, it proposes the following specific revisions:

(a) With regard to article 2, paragraph 1 (b), since the question of whether the constituent units of a federal State represent the State is a matter of internal law, and since the national legislation and practice of different States in this respect vary, we propose that this item be deleted;

(b) With regard to the title of Part III, since immunities of States constitute a basic principle of international law founded on State sovereignty and the equality of sovereignty, we believe that it would be better and closer to reality if the title retained the words "exceptions to";

(c) With regard to the disputes mentioned in articles 11 and 12, since such disputes can also be settled by mutual agreement between the States concerned or through diplomatic channels or by means of insurance, we propose the deletion of these two articles;

(d) With regard to article 20, to facilitate the determination of the "day of service of process", we propose that paragraph 2 of this article be amended to read: "Service process referred to in paragraph 1 (b) is deemed to have been effected on the day the State concerned issues a diplomatic note acknowledging the receipt of the process."

GERMANY

[Original: English]

[14 August 1992]

1. Germany, in principle, supports the idea of convening a conference of States with the aim of adopting the envisioned convention on State immunity. The draft articles adopted by the International Law Commission form a good basis for consideration. The German Government, however, has noted considerable concern during the debates in the Sixth Committee in regard of certain provisions. Furthermore, State practice in this field still reveals a number of regional differences.

2. Bearing in mind the importance of the subject and the work done so far by the International Law Commission, the German Government holds the view that an attempt to adopt a universal convention at a conference of States should only be made if the final text is acceptable to all and finds broad support. Germany, therefore, welcomes the establishment of a working group of the Sixth Committee as provided in General Assembly resolution 46/55 of 9 December 1991 and is ready to participate in its work. The working group should consider issues that are still controversial as well as the procedural questions regarding the adoption of a convention. It should also be prepared to take note of draft documents on the subject that have been prepared by other institutions.

3. The German Government is of the opinion that the following matters, among others, should be reconsidered during such talks.

4. One of the key issues for the whole concept of jurisdictional immunities is the question of finding workable criteria to distinguish between those activities of a State which should not be covered by immunity because of their private law character and those activities which are to be considered as an exercise of sovereign authority and thus as giving rise to immunity from adjudication by foreign courts.

5. According to article 2, paragraph 2, as it stands today, the commercial character of a transaction would be determined in a two-step approach. The nature of the transaction would be the principal determinant; however, if the nature test is not entirely conclusive, a secondary test would take the purpose of the transaction into account. Germany has always advocated - and continues to advocate - that only the legal nature of the transaction should be the deciding factor. As the purpose of a transaction is often not recognizable at the time of the agreement unless it is laid open, claiming a non-commercial purpose when it comes to judicial review will thus often be tantamount to depriving a private party of any means to seek judicial redress.

6. Even under the present system, where it is up to the forum State's court to decide whether a non-commercial purpose gives rise to immunity, an uncertainty remains: in determining the purpose, the court would ultimately have to rely on information provided by the Government invoking immunity.

7. As to article 10, Germany has no difficulty with the principle that a State enterprise with an independent legal personality engaged in a commercial transaction should be treated like any other private person in this field and that the question of immunity remains unaffected. The problem behind this rule, however, is a question of liability. Germany has already pointed out that this provision would enable a State secretly to avoid any liability risk by setting up such independent entities without providing sufficient capital. Consequently, when it comes to execution, a private party might find that there is no property to be seized although the enterprise is clearly run by the parent State. It seems that where a State enterprise engages in commercial activities, at least the (liable) capital should be made transparent in order to allow a party to the contract to assess in advance the risk involved in trading with such an entity.

8. Debates in the Sixth Committee concerning article 18 have also revealed concern by a number of States about the inclusion in one provision of both pre- and post-judgement measures. Taking into account the differences existing between various national enforcement systems, the problem with article 18 seems to be more than a terminological issue. The problem should be carefully reconsidered before adoption in order to make the final text acceptable for all States.

9. The provision in article 18, paragraph 1 (c), that measures of constraint would be taken only against property that has - in addition to two other elements - a "connection" with the claim which is its object seems to limit unnecessarily the cases where property may legitimately be seized. Furthermore, the kind of "connection" required is not entirely clear. Germany had welcomed the proposal made earlier by the Special Rapporteur to delete this part of the sentence. The Special Rapporteur's proposal should be reconsidered before adoption of the text.

10. Article 19, paragraph 1 (a), reflects the principle established in State practice that no measures of constraint may be taken against State property for use of diplomatic and other missions in the forum State. The commentary rightly acknowledges, however, that certain property - for example, bank accounts held by an embassy - may be maintained for commercial purposes only and thus does not fall under the notion of property used for the State's diplomatic function. When it comes to deciding whether or not a bank account belongs to either of the two categories, the question of standard of proof comes into play. As far as property used for the maintenance of the respective diplomatic mission is concerned, a general declaration by the State, possibly in the form of a certificate, will suffice. However, neither article 18 nor the commentary indicate how the question of proof is to be handled by the court where other property is concerned.

11. The rule laid down in article 22, paragraph 2, that a State would be exempt from providing any security, even when acting as plaintiff, accords an unwarranted privilege to States and is therefore not acceptable. In practice, the defendant will in many cases find it difficult to obtain reimbursement of the costs incurred in the proceedings. In any given case, the situation is thus unbalanced and unfair from the very beginning. Whereas the plaintiff State can institute proceedings practically free of risk, even the successful defendant may eventually face considerable loss. For the German Government, it seems to be a matter of fairness to say that where a State has demonstrated its intention to seek judicial redress before a forum court, making use of its procedure like any other private person, it should be treated like any other person and be subject to the procedural regulations which are applicable to all. The original proposal by the Special Rapporteur to amend paragraph 2 so as to require at least the plaintiff State to provide security went in the same direction.

12. As to the problem of the settlement of disputes concerning the interpretation or application of the envisioned text, Germany recalls the fact that the European Convention on State Immunity of 1972, in an additional

protocol, contains an elaborate system of this kind. Taking into account the subject of this draft convention, the German Government wonders whether the draft proposal is complete without any provision in this sense.

TURKEY

[Original: English]

[9 July 1992]

1. Article 11 entitled "Contracts of employment" does not take account of the nature of administrative contracts in connection with immunity from jurisdiction. Admittedly, paragraph 2 of the article recognizes the possibility of invoking immunity from jurisdiction in cases where the employee has been recruited to perform functions closely related to the exercise of governmental authority. However, that provision is not sufficient to cover all categories of administrative contracts which should benefit from immunity.

2. The clause "discharge from employment" should be added to paragraph 2 (b) of article 11 of the draft articles.

3. According to article 10, paragraph 1, the State engaging in a commercial transaction with a person, natural or juridical, other than its own national, cannot invoke immunity from the exercise of jurisdiction by the judicial authority of another State where that judicial authority is competent to exercise its jurisdiction by virtue of its applicable rules of private international law.

4. Turkey does not favour the suggestion to include into the draft a clause establishing a jurisdictional link between a commercial transaction and a forum State. Such a clause could create difficulties in determining which country's internal law would be the basis of the linkage to be done. The existence of such a clause would also impede the finding of a solution in case of the involvement of more than one State.

5. Furthermore, during the discussions of article 16 entitled "Ships owned or operated by a State", a query was submitted as to whether the expression "ships" could be understood to include "aircraft" as well as seagoing vessels. Turkey's interpretation on this issue is to limit the term "ships" to "seagoing vessels". This interpretation is in line with the commentary on the draft articles.

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CONVENTION ON JURISDICTIONAL IMMUNITIES OF STATES AND THEIR PROPERTY

Report of the Secretary-General

Addendum

CONTENTS

Page

II. REPLIES RECEIVED FROM STATES

Greece 2

Mexico 2

Poland 4

92-45539 3499j (E) 240992 240992

240992

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GREECE

[Original: French]

[9 September 1992]

1. The Government of Greece believes that the draft articles on jurisdictional immunities of States and their property, adopted by the International Law Commission at its forty-third session, are on the right track because they are based on the so-called "relative immunity" option.

2. In this connection, the Government of Greece would like to express its appreciation to the Commission for the remarkable work it has carried out, and also to the special rapporteurs and particularly Mr. Sompong Sucharitkul of Thailand, who made a decisive contribution to the drafting of the articles.

3. In view of the importance of the draft articles, the Government of Greece believes that it would be desirable to convene an international conference that would have the task of converting the draft prepared by the International Law Commission into an international convention.

4. Needless to say, the Government of Greece reserves the right to make specific comments on the draft articles, both in the Sixth Committee and at the conference, if it is decided to convene such a conference.

MEXICO

[Original: Spanish]

[15 September 1992]

1. The Government of Mexico welcomes the adoption by the International Law Commission of the draft articles in question.

2. Although the Government of Mexico expressed some reservations during the forty-sixth session of the General Assembly as to the desirability of seeking to achieve immediate results, it is none the less fully prepared to participate in the Working Group to be established to review the draft articles. The following are specific comments on some articles of special interest to the Government of Mexico.

3. In article 7, on express consent to exercise of jurisdiction, it is recommended that the term "express declaration" be used in paragraph 1 (c).

4. In article 12, on personal injuries and damage to property, it is suggested that the following exception be included: "Immunity would be respected if the State which was the author of the act or omission was fulfilling an international agreement, or if the State which was the author of the act or omission was performing diplomatic functions."

5. Moreover, article 13, on ownership, possession and use of property, should be subject to the exception that immunity of property which is covered by immunity of property* must be respected; in particular, the article should be drafted in the same manner as article 16, paragraph 7, which refers to a certificate for ships signed by the competent authority of the State concerned.

6. With regard to article 14, on intellectual and industrial property, the scope of the article should be limited to commercial purposes.

7. With regard to article 17, on the effect of an arbitration agreement, it would be appropriate to add the words "in accordance with its domestic laws" after the phrase "If a State", since not all domestic legal systems grant to foreign nationals the same access to the courts as is available to the State's own nationals.

8. In article 18, on State immunity from measures of constraint, it is suggested that the text be brought into line with article 16, paragraph 7, i.e., the competent authority of the State concerned should issue a certificate earmarking property which might be subject to measures of constraint.

9. Also in article 18, it is suggested that the term "express declaration" be added to paragraph 1 (a) (iii).

10. It would be advisable to delete article 19, paragraph 2, since it is unlikely that a State would waive immunity for the specific categories of property envisaged in this article. Furthermore, State immunity from measures of execution or constraint, as they have been called, should apply to the property of a State situated within its own territory or within the jurisdiction of the forum State or a third State, or even in areas beyond national jurisdiction.

11. Accordingly, it is suggested that the inclusion of article 23 be reconsidered, unless the purpose for which the property is used is consistent with the wording of article 16, paragraph 7.

12. With regard to article 21, default judgement has no juridical basis in the international practice of States; accordingly, the article should be deleted.

13. Lastly, with regard to article 22, on privileges and immunities during court proceedings, such privileges and immunities should apply to any document which a State, in accordance with its laws, regulations and policies, deems to be exempt from disclosure, subject to a determination in that regard by a competent authority on the basis of article 16, paragraph 7.

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* Translator's Note: Words appear to be missing in the original.

POLAND

[Original: English]

[20 August 1992]

I. General comments

1. The Government of Poland accepts in principle the conception of the "limited jurisdictional immunities" of States and their property in all kinds of legal procedures and proceedings. Poland also supports convening an international codification conference for the adoption of a universal convention on jurisdiction immunities of States and their property as soon as it would be practicable. It seems that such a conference should be preceded by further satisfactory preparations, taking into account that the best part of that work has already been done by the International Law Commission and the Sixth Committee.

2. The Government of Poland reserves the right to express further more detailed views and opinions on the draft articles during the negotiations to be held before the final adoption of the convention.

II. Specific comments on individual articles

3. The Government of Poland is of the view that article 17, "Effect of an arbitration agreement", of the draft articles adopted by the International Law Commission ought to be completed as was previously suggested by Qatar (see A/CN.4/415, para. 197).

4. Poland supports this suggestion and considers that in subparagraph (c) the words "the recognition and enforcement or" should be added before the words "the setting aside of the award". Adoption of such a suggestion as has been mentioned above could be in conformity with the provisions of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York on 10 June 1958.

5. The Government of Poland does not share the opinion expressed by the Special Rapporteur in his recommendation on this article that the point of Qatar's suggestion seems to be covered by the words "validity" in subparagraph (a) and "arbitration procedure" in subparagraph (b) respectively.

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CONVENTION ON JURISDICTIONAL IMMUNITIES OF STATES AND THEIR PROPERTY

Report of the Secretary-General

Addendum

CONTENTS

Page

II. REPLIES RECEIVED FROM STATES

Italy 2

Venezuela 4

ITALY

[Original: English]

[18 September 1992]

1. Italy expresses once again its appreciation for the work carried out by the International Law Commission and its Special Rapporteurs on the subject of jurisdictional immunities of States and their property. In particular, Italy welcomes the accomplishment by the Commission of the task of adopting the final draft articles related to this very important and delicate matter. At the same time, the need to promote a large convergence of views on the issues raised by the text submitted by the Commission requires, in the opinion of the Government of Italy, that a thorough review of such issues be conducted within the Sixth Committee during the forty-seventh session of the General Assembly. In this respect, Italy intends to participate in the open-ended working group established under resolution 46/55 of 5 December 1991 and thus contribute to the progress of the discussion on both substantive and procedural points.

2. On the question of immunity of States from the jurisdiction of the courts of another State, Italy recognizes that a considerable effort has been made by the Interntional Law Commission in the search for solutions that would achieve the necessary balance between the main tendencies of State practice. However, there are also elements in the text adopted by the International Law Commission indicating that such balance is still far from being reflected, at least to an adequate extent in the final draft articles. In addition, other circumstances demand a further effort, at this stage, aimed at considering ways to improve the regime proposed by the Commission and make it more responsive to the attitude and the needs of today's international society.

3. First of all, the International Law Commission draft seems to contradict from various points of view the dominant tendency of State practice to circumscribe the application of immunity of States from foreign jurisdiction to certain activities involving the exercise of the sovereign authority of a State. The text of article 5 shows in fact from the outset the adherence of the draft to the theory under which immunity is the rule and the cases of submission of a State to the jurisdiction of foreign Courts are the exceptions, to be interpreted as such in a restrictive way. Moreover, the scope of application of these same exceptions is sometimes expressly narrowed by the relevant provisions of the draft. One may refer, in particular, to the inclusion of the "purpose" of the contract or transaction involved among the criteria that are relevant for determining the notion of "commercial transaction" in which a State is engaged (article 2, paras. 1 (c) and 2, and article 10); or to the conditions required by article 12 for excluding the immunity from jurisdiction in proceedings which relate to compensation for damage to persons or properties caused by an act or omission attributable to a State. In the first example, the present formulation of article 2, paragraph 2, precludes the submission of a State to the jurisdiction of foreign courts, even with respect to typical commercial transactions such as the purchase of goods or the provision of services, whenever the same State

claims that they were effected for a "public purpose". Whereas, regarding article 12, the circumstance that immunity cannot be invoked only if the act or omission occurred in the territory of the State of the forum and if the author was present in that territory at the time of the act or omission, is highly detrimental, for instance, to the adjudication in the affected State of cases of transfrontier pollution due to (commercial and non-commercial) activities of the source State. Conversely, while domestic legislations and international instruments tend often to exclude that a State may invoke immunity from jurisdiction in proceedings relating to contracts of employment concluded with a national of the State of the forum for work to be performed in the territory of such latter State (regardless of the functions assigned to the employee), article 11, paragraph 2 (a), of the draft grants the immunity, in the same circumstances, if "the employee has been recruited to perform functions closely related to the exercise of governmental authority", thus providing additional evidence of the tendency of the text proposed by the Commission to accord States a degree of immunity from foreign jurisdiction wider than that to which they are entitled under present international practice.

4. On the other hand, it should be noted that the application of many countries, including Italy, of the concept of "restrictive immunity" of States from the jurisdiction of the courts of another State has been carried on for a long period of time without giving rise to true international disputes. Furthermore, the changes that have recently occurred in the structure of the international community and in various national economic systems open the possibility for a modification in the attitude of a number of States traditionally in favour of the principle of "absolute immunity". Finally, it must be considered that every extension of the immunity of States from foreign jurisdiction implies an equal limitation of the individual right of access to courts: i.e., of a fundamental human right which is proclaimed today not only by most national constitutions but also by various important international instruments. As a result, the acceptance by States practising restrictive immunity of a different regime privileging in a rigid way the prerogatives of sovereignty cannot be justified on the ground that divergent views have led in this area to significant conflicts at an international level. Nor would such a regime reflect a series of visible trends developing in present international society and legislation, to which special attention should be devoted in order to facilitate widespread agreement on the question at stake.

5. Similar considerations can be made as regards the issue of State immunity from measures of constraint in connection with proceedings before a court, which is addressed in articles 18 and 19 of the International Law Commission draft. In fact, the possibility for a State to exercise enforcement jurisdiction over foreign State assets is severely limited by these provisions and therefore the rights of private litigants vis-á-vis foreign States are equally curtailed. In particular, the enforcement within a State of judgements rendered against another State is made conditional upon the express consent of the defendant State (article 18, paras. 1 (a) and (b)), or upon the circumstances that the claimant provides evidence of the destination of the property concerned to "other than government, non-commercial purposes"

(para. 1 (c) of the same article). Besides, article 19 adds a detailed list of categories of property of a State that are exempted a priori from measures of constraint, and for some of these categories the text does not seem to provide sufficient guarantees that the exempted property is always utilized for non-commercial purposes. More generally, also in this field the International Law Commission draft tends to accord States a far vaster immunity than they are entitled to under current customary international law. Consequently, the possibility of following a more balanced approach should be attentively explored, with a view to achieving an adequate level of consensus. It is important to note, on this problem, that in many States, including Italy, the tendency is steadily growing towards more restrictive immunity.

6. Against this background, Italy believes that all efforts should be made in order to avoid frustration of the work of the International Law Commission by the lack of sufficient acceptance by Governments of a convention on jurisdictinal immunities of States and their property. Therefore, the question of a plenipotentiary conference for the adoption of such a convention should be resolved having regard, primarily, to the object of defining a regime which can obtain the widest support and provide an effective regulation of interstate relationships in the area concerned.

VENEZUELA

[Original: Spanish]

[22 September 1992]

1. The following is the opinion of the Government of Venezuela on the matter:

2. In accordance with paragraph 4, subparagraph (a), of General Assembly resolution 46/55, the working group to be established in the Sixth Committee during the forty-seventh session should examine issues of substance arising out of the draft articles, in order to facilitate the conclusion of a convention through the promotion of general agreement.

3. In accordance with paragraph 4, subparagraph (b), of the resolution, the working group should examine the question of the convening of an international conference, which could be held in 1994 or subsequently, to conclude a convention on jurisdictional immunities of States and their property.

4. So far as comment on the substantive issues in the aforementioned draft articles is concerned, on several occasions the Venezuelan Government has expressed its views on the various versions, prepared by the International Law Commission, for the articles which it has now completed in the second reading.

5. From our point of view, the text of 22 articles, as drafted in the second reading, meets the expectations and concerns of Venezuela on the matter and, in our judgement, addresses the important situations meriting regulation as regards the jurisdictional immunities of States and their property.

6. It may be necessary, however, to examine, probably in the working group, the questions raised by some members at the conclusion of the debate in the Commission, such as State-owned or State-operated aircraft engaged in commercial service and space objects, with the understanding, furthermore, that the draft of the final provisions, including a legal mechanism for the settlement of disputes, could be prepared by the Secretariat or the conference of plenipotentiaries.

7. Concerning the adoption of the draft articles by the international community, in accordance with the Commission's recommendation made at its 2235th meeting, on 4 July 1991, we believe that the international conference of plenipotentiaries should have competence to examine the draft articles and to conclude an international convention on the subject.

8. As provided in resolution 46/55, this conference could be held in 1994 or subsequently, depending on how the States in the working group and the Sixth Committee decide at the forty-seventh session of the General Assembly.